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In the Supreme Court of the United States

OCTOBER TERM, 1987

LESLIE LOWENFIELD, PETITIONER

v.

C. PAUL PHELPS, SECRETARY, LOUISIANA DEPARTMENT OF CORRECTIONS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

The United States will address the following question:

Whether the trial court's inquiry about the usefulness of further deliberations by the jury and the court's subsequent use of an *Allen* charge had a coercive effect on the jury.

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INTEREST OF THE UNITED STATES

It is not uncommon for juries in federal criminal cases to have difficulty reaching a verdict or to become deadlocked at some point during their deliberations. The federal government therefore has a substantial interest in the procedures that trial courts may follow when a jury is deadlocked or otherwise reports difficulty in its deliberations. The first question in this case is whether the trial court's inquiry about the usefulness of further deliberations and the court's subsequent use of an *Allen* charge coerced the jury into returning a capital sentence. This Court's resolution of that question could affect the kinds of procedures federal and state courts are permitted to employ when such problems arise during trial, in both capital and non-capital cases.

STATEMENT

1. Petitioner was convicted in 1985 of killing a woman with whom he had lived and four members of her family. On May 14, 1985, at the conclusion of the evidence in the guilt phase of the trial, the jury deliberated from 11:45 a.m. until 7:45 p.m., at which point the jury recessed for the night (J.A. 3-4). The jury resumed its deliberations at 10:05 a.m. the next morning and returned its verdicts shortly after 3:00 p.m. (J.A. 3-4, 25-27). Petitioner was found guilty on three counts of first degree murder and two counts of manslaughter (J.A. 12).

Defense counsel moved for a 24- to 48-hour delay before commencing the sentencing phase of the trial. The trial judge denied the motion, explaining that he had "talked with the jurors for a moment to see what their mental and physical state was" and that the jurors had unanimously reported that they were physically and mentally ready to begin the sentencing phase (J.A. 28). The trial judge, however, did recess court until 6:05 p.m., when the penalty phase began (J.A. 6; see J.A. 31-43).

Shortly after 8:00 p.m., the trial court instructed the jury (J.A. 7, 43-47). The court advised the jury that if it could not reach a verdict, the court would impose a sentence of life imprisonment without parole (J.A. 46). The court then instructed the jury as follows (*ibid.*):

> When you enter the jury room it is your duty to consult with one another to consider each others views and to discuss the evidence with the objective of reaching a just verdict. If you can do so without violence to your individual judgment. Each must decide the case for yourself but only after discussion and impartial consideration of the case with your fellow jurors. You

> are not advocates for one side or the other. Do not hesitate to re-exam [*sic*] your own views and to change your opinion if you are convinced you are wrong but do not surrender your honest belief as to the weight and effect of evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

Defense counsel did not object to that instruction. The jurors requested and were allowed to retire at 11:55 p.m. (J.A. 7, 15-16, 48).

The jury reconvened the next day at 9:40 a.m. (J.A. 8). At 11:45 a.m., counsel for the defense moved for a mistrial because of the length of time the jury had been out and because of an instruction given by the trial judge at the guilt phase (J.A. 8, 50-51). The trial judge denied the motion, stating that "[the jurors] are still working towards the verdict," as indicated by the jury's notes (J.A. 51). At 3:05 p.m., defense counsel reurged the motion when a note came from the foreman of the jury stating, "The jury is having great distress and is unable to reach a decision at this point. There is a great unbalance in the voting. Please call us back in and direct the jury again as to its responsibilities and the oath we took" (J.A. 17; see J.A. 51-53). The trial judge denied the mistrial motion, and instead used a procedure that the prosecution and the defense had agreed upon during a conference with the judge in chambers (J.A. 52). The jury was called back in and the following colloquy occurred (J.A. 53-54):

> THE COURT: Mr. Conzoneri [the foreman] I'd like you to answer the question that I have and I'd like you to only answer it yes or no: Does the jury have a verdict on any Count?
>
> THE FOREMAN: No, sir.

THE COURT: Ladies and Gentlemen, as I instructed you earlier if the jury is unable to unanimously agree on a recommendation the Court shall impose a sentence of Life Imprisonment without benefit of Probation, Parole or Suspension of Sentence.

The procedure I'm going to go through is I'm going to aska [*sic*] question and I'm going to ask Mr. Conzoneri to please give me the anser [*sic*] to the question. Then I'm going to pass out pieces of paper to each juror, and I'm going to ask them to write their nam [*sic*] on the piece of paper and write your individual answer to the question on the paper. Then we'll pick that up.

The question is: I ask you if further deliberations would be helpful in obtaining a verdict.

Mr. Conzoneri, could you please answer that question.

THE FOREMAN: Yes, sir.

THE COURT: Please pass out the papers.

On those pieces of papers if you would please put down your named [*sic*] down and then if you please answer that same question: If further deliberations would be helpful in obtaining a verdict? What is your answer to that question?

The jurors wrote out their answers; eight replied in the affirmative, and four in the negative (J.A. 17, 54). The defense moved for a mistrial on the ground that the jury was unable to reach a verdict, and the trial court again denied the motion (J.A. 54-55). After collecting the jurors' responses, the judge had the jury leave the courtroom. Almost immediately, the trial judge received a note from the foreman stating that some of the jurors had misunderstood the court's question and that the jury wished to be repolled (J.A. 17, 55). The trial judge brought the

jury back into the courtroom and said the following (J.A. 55):

> THE COURT: I'm going to ask the question again.
>
> I'm going to change a couple of words of it to make it a little bit more precise. Then I'm going to pass out pieces of paper and I'm going to ask you again to write your name and answer to it.
>
> The question is: Do you feel that any further deliberations will enable you to arrive at a verdict?
>
> I'll repeat that: Do you feel that any further deliberations will enable you to arrive at a verdict?
>
> Please put your name and yes or no.

This time, the jury split 11-1 in favor of the view that further deliberations might enable it to reach a verdict (J.A. 18). The judge reinstructed the jury as the foreperson had requested (J.A. 56):

> THE COURT: Ladies and Gentlemen, as I instructed you earlier if the jury is unable to unanimously agree on a recommendation the Court shall impose the sentence of Life Imprisonment without benefit of Probation, Parole, or Suspension of Sentence.
>
> When you enter the jury room it is your duty to consult with one another to consider each other's views and to discuss the evidence with the objective of reaching a just verdict if you can do so without violence to that individual judgment.
>
> Each of you must decide the case for yourself but only after discussion and impartial consideration of the case with your fellow jurors. You are not advocates for one side or the other. Do not hesitate to reexamine your own views and to change your opinion if you are convinced you

> are wrong but do not surrender your honest belief as to the weight and effect of evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

Defense counsel did not object to the poll or to the supplemental instruction.

The jury resumed its deliberations and in 30 minutes returned a verdict. Petitioner was sentenced to death on all three counts of first degree murder (J.A. 17-18, 57-58).[1]

2. On direct appeal, petitioner argued that the trial court's actions at the sentencing stage were improper, for several reasons. First, petitioner argued that the trial judge should have declared a mistrial when the jury indicated it was having difficulty reaching a verdict. The Louisiana Supreme Court rejected petitioner's argument. The court stated that a trial court is not obliged "to declare a deadlock at the first sign of trouble," and it found that in the circumstances of this case, the trial court did not abuse its discretion in allowing the deliberations to continue. *State* v. *Lowenfield*, 495 So. 2d 1245, 1259 (La. 1985), cert. denied, 476 U.S. 1153 (1986). Second, petitioner argued that the trial judge coerced the verdict from the jury. The state supreme court re-

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[1] The exact time that the jury spent deliberating after the supplemental charge is unclear from the record. The Louisiana Supreme Court stated that it was "less than an hour." *State* v. *Lowenfield*, 495 So. 2d 1245, 1259 (La. 1985), cert. denied, 476 U.S. 1153 (1986). The federal district court and court of appeals stated that it was 30 minutes (J.A. 79, 112). The record does not indicate a precise time, but only reflects that the final deliberations took less than 55 minutes. Compare J.A. 17 (time of foreman's note stating that some jurors misunderstood the trial court's question) with J.A. 18 (time of foreman's note stating that the jury had reached a verdict).

jected that argument as well, finding that "[t]here is nothing in the record to suggest or indicate that the verdict was rendered as a result of any coercive influence by the court" (*ibid.*). The court added that it is "a well settled proposition" that a trial court may "impress upon th[e jurors] the importance of the case, urge them to come to agreement, and send them back for further deliberation" when the court learns that the jury is having difficulty in agreeing (*ibid.*). Finally, the state supreme court rejected petitioner's arguments that the jury was permitted to deliberate for an unduly long period and that the trial court should have granted a recess between the guilt and sentencing phases of the trial (*id.* at 1259-1260).

3. Petitioner then sought a writ of habeas corpus from the United States District Court for the Eastern District of Louisiana. In his petition, he reasserted his claim that the jury had been coerced into returning a capital sentence. The district court rejected that claim, finding that the totality of the circumstances did not establish coercion (J.A. 79). The court of appeals, by a divided vote, also rejected petitioner's contention (J.A. 100-126). The majority noted that petitioner did not challenge either supplemental instruction used by the trial court (J.A. 113). In any event, the court of appeals found that "there is no showing of coercion; the record certainly does not demonstrate coercion sufficient to render the trial fundamentally unfair" (*ibid.*). The dissenting judge argued that the trial court's inquiry into the jury's numerical division, combined with the supplemental charge encouraging the jury to reach a verdict, coerced the jury into returning a capital sentence (*id.* at 127-134 (Johnson, J., dissenting)).

SUMMARY OF ARGUMENT

A. For more than 90 years, this Court and every federal court of appeals have authorized federal trial judges to deliver a supplemental instruction to a deadlocked jury encouraging the jurors to consider the views of the others in an effort to reach a verdict if they could do so without abandoning their honest beliefs. See *Allen* v. *United States*, 164 U.S. 492 (1896). These instructions serve an important purpose in the criminal process, and if appropriately phrased they are not likely to coerce a jury into reaching a verdict.

A supplemental instruction encouraging each member of the jury to listen to and consider the viewpoints of his fellow jurors may be a useful means of ensuring that each juror will carry out his sworn responsibilities. Such an instruction can avoid the severe burdens on the criminal justice system that result from unnecessary retrials. Even when, as in this case, no retrial is possible, a supplemental instruction like the one given here reminds jurors of their duty to continue trying to reach a unanimous verdict if it is possible to do so without sacrificing conscientiously held beliefs.

The modified *Allen* charge used in this case was not coercive. It simply directed the jurors to listen to one another; it made clear that the jurors should not abandon their conscientiously held beliefs simply to reach a verdict; and it did not focus its attention on the jurors in the minority.

B. In *Brasfield* v. *United States*, 272 U.S. 448 (1926), this Court adopted a procedural rule for the federal courts prohibiting a trial judge from asking the jury for its numerical division when that inquiry is followed by an *Allen* charge. That rule does not

govern this case, for two reasons. First, the rule in *Brasfield* was not a constitutional rule and therefore is not applicable to state court proceedings. Second, the inquiry whether further deliberations would be helpful is materially different from an inquiry into the jury's numerical division. The former question is designed to enable a trial judge to determine whether to discharge the jury, rather than to isolate jurors in the minority. In addition, the inquiry concerning the usefulness of further deliberations is a neutral one; it does not suggest to the jury that the judge favors either party, or that the judge expects the jury to reach a verdict at all.

The principal focus in a case such as this one should be on whether the court's actions had the effect of coercing a verdict. Even if a judge improperly inquires into the division of the jury, that inquiry should be treated simply as one factor in determining whether the jury was coerced in a particular case. In this case, neither the supplemental instruction nor the trial judge's inquiry of the jurors was coercive, either standing alone or viewed in light of all the circumstances.

ARGUMENT

THE TRIAL COURT DID NOT COERCE THE JURY INTO RETURNING A CAPITAL SENTENCE

Petitioner claims (Br. 11-30) that the trial court coerced the jury into returning a capital sentence. Although petitioner relies on the totality of the circumstances in arguing that the trial court's actions were tantamount to a directed verdict, the two principal objections asserted by petitioner are (1) the trial court's use of a so-called "dynamite" or "blasting" jury charge, and (2) the court's inquiry as to whether further jury deliberations would be helpful.

These actions, petitioner argues, encroached on the jury's independence and robbed him of any chance to receive a non-capital sentence. We submit that the court's actions were consistent with the principles governing the proper management of deliberating juries and did not have the coercive effect that petitioner claims.

A. The Trial Court's *Allen* Charge Was Not Coercive

1. *The* Allen *charge serves legitimate purposes and is not inevitably coercive*

It is not uncommon for the jury in a criminal case to have difficulty reaching a unanimous verdict. When that occurs, the trial judge must decide how long to allow the jury to deliberate before declaring a mistrial. The determination is a difficult one because of the competing interests at stake. On the one hand, refusing to discharge the jury after protracted deliberations poses the risk that any ensuing verdict will be the product of exhaustion, not reason. On the other hand, a mistrial imposes considerable costs on the criminal justice system. Delay is the enemy of truth and can render a retrial difficult, if not impossible, because the memories of witnesses can fade, witnesses may decline to testify, they may move or die, and critical evidence may be lost. Nor is accuracy the only victim of delay. All the participants in the criminal justice system—judges, prosecutors, victims of crime, the community, and the persons accused of crime—have an interest in seeing the jury reach a verdict at one trial if possible.[2] Accord-

[2] The effect of retrials on the trial court is to increase the court's caseload, which inevitably delays the disposition of other cases and decreases the care with which the court can handle each of the matters before it. Retrials also increase

ingly, a procedure that can avoid unnecessary retrials serves compelling societal interests.

One such procedure is to remind the jurors, when they have difficulty reaching a verdict, of their responsibility to be open-minded and to consider the views of each juror with the objective of reaching a verdict if it is possible to do so. That practice has long been approved by the federal courts. For more than 90 years, it has been the rule in federal criminal cases that, when the jurors have difficulty reaching a verdict, the trial judge is not obliged either to declare a mistrial or to remain silent. See *United States* v. *Allis*, 73 F. 165, 182-183 (E.D. Ark. 1893), aff'd, 155 U.S. 117 (1894). Instead, the judge may encourage the jurors to reach a verdict by delivering a so-called "*Allen* charge," a jury instruction named after the decision that first expressly approved the practice, *Allen* v. *United States*, 164 U.S. 492 (1896).

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the burden on the prosecution, which may force the prosecutor to agree to plea bargains that would otherwise be unacceptable, or to abandon some cases altogether. Delay can impair the defendant's ability to establish his innocence, and it inevitably disrupts his personal life, especially if he is in custody. Other defendants, guilty and innocent, will suffer the same burdens if their trials are postponed in order to accommodate additional retrials in other cases. Witnesses needlessly relive painful experiences, which deters voluntary cooperation with the criminal justice system and makes the victims of crime also victims of the system. The community's interest in the swift administration of justice is harmed by delay, as is society's interest in the incapacitation, rehabilitation, and deterrence of offenders. And when a person accused of a serious crime is free on bail, a delay in bringing his prosecution to a close prolongs public anxiety over community safety and increases the risk that he will commit new crimes while he is at large.

In the *Allen* case, this Court held that it was proper for a trial court to give a supplemental instruction to a deadlocked jury encouraging the jurors, particularly those in the minority, to be open-minded and to reconsider their views in light of the viewpoint of the majority, so that a definitive verdict might be reached. 164 U.S. at 501-502. An instruction of that type is valid, the Court held, since it is fully consistent with the rationale for having a jury deliberate on a defendant's guilt or innocence. As the Court explained, the verdict should represent the honest opinion of each individual juror, but it does not follow that a juror will not change his opinion in conference with the other jurors. On the contrary, "[t]he very object of the jury system is to secure unanimity by a comparison of views, and by arguments among the jurors themselves." *Id.* at 501. "It certainly cannot be the law," the Court stated, "that each juror should not listen with deference to the arguments" of the other jurors "with a distrust of his own" if a majority of the other jurors disagree with him; that a juror could begin deliberations with "a blind determination that the verdict shall represent his opinion of the case at that moment;" or that a juror could "close his ears" to the views of the other jurors. *Ibid.* The instruction given in the *Allen* case did no more than advise the jury of its proper function, the Court found, and therefore was not erroneous. *Ibid.*

Since the decision in *Allen*, this Court has twice upheld convictions that were challenged on the ground that the verdict was coerced by an *Allen* charge. *Lias* v. *United States*, 284 U.S. 584 (1931), aff'g 51 F.2d 215, 218 (4th Cir. 1931); *Kawakita* v. *United States*, 343 U.S. 717, 744 (1952), aff'g 190 F.2d 506, 521-528 (9th Cir. 1951); cf. *Hyde* v.

United States, 225 U.S. 347, 381-383 (1912).[3] None of the cases cited by petitioner (Br. 12, 25), such as *Turner* v. *Louisiana*, 379 U.S. 466 (1965) (contacts between jurors and deputy sheriffs who were the principal prosecution witnesses); *Estes* v. *Texas*, 381 U.S. 532 (1965) (televised trial); *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966) (prejudicial publicity before and during trial); and *Parker* v. *Gladden*, 385 U.S. 363 (1966) (contacts between jurors and bailiff), has undercut the holding in *Allen*. An *Allen* charge simply does not contain the "overt coercive elements" present in those cases. *United States* v. *Brown*, 411 F.2d 930, 932 (7th Cir. 1969), cert. denied, 396 U.S. 1017 (1970).

The reasoning in *Allen* is still valid today. The rationale for requiring a jury to deliberate is that joint consideration of the evidence and arguments of counsel by the entire jury, and the comparison of the viewpoints of each juror with those of his colleagues, is more likely to produce an accurate and just outcome than is simply taking a vote on the accused's guilt or innocence. Cf. *Ballew* v. *Georgia*, 435 U.S. 223, 232-234 (1978) (opinion of Blackmun, J.). A trial by jury has its "weaknesses" (*Singer* v. *United*

[3] In *Lias*, the court of appeals had upheld a supplemental instruction "substantially" similar to the *Allen* charge. 51 F.2d at 218. This Court, on writ of certiorari "limited to the question raised by the supplemental charge to the jury" (284 U.S. at 604), affirmed the lower court's judgment per curiam, simply citing the *Allen* decision. 284 U.S. at 584. In *Kawakita*, the court of appeals had upheld a supplemental charge substantially like the *Allen* instruction. 190 F.2d at 521-528. Although the use of the instruction was one of the alleged errors relied on for reversal (see Pet. Br. 160-169, *Kawakita* v. *United States*, No. 570, 1951 Term), this Court disposed of the contention by grouping it with others and saying that all were "either insubstantial or so adequately disposed of by the Court of Appeals that we give them no notice." 343 U.S. at 744.

States, 380 U.S. 24, 35 (1965)), however, and one of them is that occasionally jurors may not live up to their oaths. Some jurors are loath to assume the responsibility of deciding another person's fate and prefer to avoid the obligation to decide the case before them. Some jurors may disregard their duty to consider the arguments of others. Other jurors, after having once expressed their views about the case during deliberations, may find it difficult—due to pride or obstinacy—to withdraw from their position, even if they later come to believe, on the basis of arguments made by other jurors, that their original position is no longer defensible. By reminding jurors of their duty to consider the views of their colleagues and to decide the case, if they can do so without sacrificing their conscientiously held views, an *Allen* charge can meet these and similar contingencies and avoid the costs associated with an unnecessary retrial.[4]

It is no ground for objecting to an *Allen* charge that the charge may deny a defendant the benefits of a hung jury. *United States* v. *Sawyers*, 423 F.2d 1335, 1340-1341 (4th Cir. 1970); *United States* v. *Thomas*, 449 F.2d 1177, 1190 (D.C. Cir. 1971) (en banc) (Robb, J., dissenting) ("Agreement on a verdict ought to be encouraged, for the very purpose and function of a jury is to decide issues of fact, not to engage in inconclusive debate."). It is true, of course, that a hung jury can benefit a defendant, and

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[4] The available evidence suggests that the process of reaching consensus is frequently a difficult one. While juries ultimately reach agreement in more than 90% of criminal cases, jurors apparently disagree on the first ballot in approximately two-thirds of all criminal trials. *Hovey* v. *Superior Court*, 28 Cal. 2d 1, 25-26, 616 P.2d 1301, 1313-1314, 168 Cal. Rptr. 128, 140-141 (1980); H. Kalven & H. Zeisel, *The American Jury* 488 (1966).

every juror certainly has the power to refuse to return a guilty verdict in the teeth of overwhelming evidence. But just as a defendant has no entitlement to a "lawless" jury (*Strickland* v. *Washington*, 466 U.S. 668, 695 (1984)), or to have the jury told that it may refuse to convict him notwithstanding clear proof of his guilt,[5] so too a defendant has no protected interest in a hung jury that could be undermined by an *Allen* charge.

To be sure, the *Allen* charge has been the object of criticism by the lower federal courts and commentators on the ground that it is potentially coercive.[6] To avoid that problem, some courts of appeals, in the exercise of their supervisory powers, have approved variants on the original *Allen* charge. The different formulations approved by the courts of appeals are

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[5] See, *e.g.*, *United States* v. *Buttorff*, 572 F.2d 619, 627 (8th Cir. 1978); *United States* v. *Dougherty*, 473 F.2d 1113, 1130-1137 (D.C. Cir. 1972); *United States* v. *Dellinger*, 472 F.2d 340, 408 (7th Cir. 1972), cert. denied, 410 U.S. 970 (1973); *United States* v. *Moylan*, 417 F.2d 1002, 1005-1007 (4th Cir. 1969), cert. denied, 397 U.S. 910 (1970).

[6] See, *e.g.*, *Huffman* v. *United States*, 297 F.2d 754, 756-759 (5th Cir. 1962) (Brown, J., concurring in part and dissenting in part); *Andrews* v. *United States*, 309 F.2d 127, 129-130 (5th Cir. 1962) (Wisdom, J., dissenting); *Green* v. *United States*, 309 F.2d 852, 854 n.3 (5th Cir. 1962); *Thaggard* v. *United States*, 354 F.2d 735, 739-741 (5th Cir. 1965) (Coleman, J., concurring); *United States* v. *Brown*, 411 F.2d 930 (7th Cir. 1969), cert. denied, 396 U.S. 1017 (1970); *United States* v. *Fioravanti*, 412 F.2d 407, 415-420 (3d Cir.), cert. denied, 396 U.S. 837 (1969); *United States* v. *Thomas*, 449 F.2d 1177 (D.C. Cir. 1971) (en banc); see also Note, *On Instructing Deadlocked Juries*, 78 Yale L.J. 100 (1968); Note, *Deadlocked Juries and Dynamite: A Critical Look at the "Allen Charge"*, 31 U. Chi. L. Rev. 386 (1964); see generally Note, *The Allen Charge: Recurring Problems and Recent Developments*, 47 N.Y.U.L. Rev. 296, 314 (1972).

each designed to avoid some of the features of the *Allen* charge that have provoked criticism, without undermining the effectiveness of the original instruction in reminding the jury of its duty to deliberate in good faith.[7]

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[7] The Second, Fifth, Sixth, Ninth, Tenth, and Eleventh Circuits have approved *Allen* charges that speak to jurors in the majority as well as jurors in the minority and that emphasize that the jurors should not surrender their honest beliefs simply in order to reach a verdict. See, *e.g.*, *United States* v. *Burke*, 700 F.2d 70, 80 (2d Cir.), cert. denied, 464 U.S. 816 (1983); *United States* v. *Kelly*, 783 F.2d 575, 576-577 (5th Cir. 1986), cert. denied, No. 86-5429 (Oct. 14, 1986); *United States* v. *Scott*, 547 F.2d 334 (6th Cir. 1977); *United States* v. *Bonam*, 772 F.2d 1449, 1450 (9th Cir. 1985); *United States* v. *McKinney*, 822 F.2d 946 (10th Cir. 1987); *United States* v. *Rey*, 811 F.2d 1453 (11th Cir. 1987), petition for cert. pending, No. 86-2060. See also U.S. Fifth Circuit District Judges Association, *Pattern Jury Instructions—Criminal Cases* 168-169 (1978); Committee on Model Jury Instructions, *Manual of Model Jury Instructions for the Ninth Circuit* 98 (1985); U.S. Eleventh Circuit District Judges Association, *Pattern Jury Instructions—Criminal Cases* 262-263 (1985). The pattern instruction followed in the Fifth and Eleventh Circuits is set out in the appendix to this brief.

The First, Third, Fourth, Seventh, Eighth, and District of Columbia Circuits, in the exercise of their supervisory powers, have required or encouraged district courts to use a milder formulation of the *Allen* charge patterned after the version approved by the American Bar Association that advises the jurors of their duty to deliberate and to attempt to reach a verdict. See *United States* v. *Angiulo*, 485 F.2d 37 (1st Cir. 1973); *United States* v. *Fioravanti*, 412 F.2d 407, 414-420 (3d Cir.), cert. denied, 396 U.S. 837 (1969); *United States* v. *Sawyers*, 423 F.2d 1335 (4th Cir. 1970); *United States* v. *Silvern*, 484 F.2d 879 (7th Cir. 1973) (en banc); *Potter* v. *United States*, 691 F.2d 1275 (8th Cir. 1982); *United States* v. *Thomas*, 449 F.2d 1177 (D.C. Cir. 1971) (en banc); see also Committee on Model Criminal Jury Instructions for the Eighth Circuit, *Manual of Model Criminal*

Although there is disagreement regarding the precise text of the instruction that should be given to juries that have reported difficulties in deliberations, there is universal agreement among the federal courts that the trial court may remind the jurors of their responsibilities to attempt to reach a verdict. Every court of appeals has approved some type of supplemental charge to deadlocked jurors encouraging them to consider the views of the other jurors and to re-examine their positions without sacrificing their conscientiously held beliefs. The Federal Judicial Center and the American Bar Association have also approved modified *Allen* charges.[8] Common to all of these formulations is the belief that the jurors have the duty to consider the views of other jurors and to reach a verdict if they can do so in good conscience, even if they find the process to be difficult. This consensus serves as powerful support for the principle that some type of supplemental instruction may be delivered to the jury during its deliberations without coercing a verdict. In sum, precedent, reason, and experience strongly counsel against the conclusion that an *Allen* charge, however modified, is inherently coercive.

2. *The supplemental jury instruction given by the trial court in this case was not coercive*

The supplemental instruction in this case was mild and balanced. It was addressed to all of the jurors, not just those in the minority. It directed them to make an individual judgment on the appropriate

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Jury Instructions for the Eighth Circuit § 7.02 (1985 & Supp. 1986). The ABA's suggested charge is set out in the appendix to this brief.

[8] Federal Judicial Center, *Pattern Jury Instructions* 17 (1982); ABA, Standards Relating to Trial by Jury § 5.4, at 145-146 (1968).

penalty. And it reminded them of their responsibility to listen to one another, to be open-minded and impartial, and to arrive at a verdict if possible. No reasonable person would have felt threatened by this admonition. See *California* v. *Brown*, No. 85-1563 (Jan. 27, 1987), slip op. 3. Significantly, petitioner did not object to the modified *Allen* charge when it was given as part of the main sentencing instructions or when the trial judge repeated the instruction during the jury's deliberations. Petitioner's silence buttresses the conclusion that the court's instructions did not have the coercive effect petitioner now attributes to them. See *Wainwright* v. *Witt*, 469 U.S. 412, 430-431 & n.11 (1985); *id.* at 437-438 & n.4 (Stevens, J., concurring).

The primary criticism of the *Allen* charge has been that it instructs jurors in the minority to re-examine their views, but does not contain a similar admonition to jurors who are in the majority.[9] It is that

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[9] See, *e.g.*, *United States* v. *Flannery*, 451 F.2d 880, 883 (1st Cir. 1971) ("[w]henever a court instructs jurors to re-examine their positions, it should expressly address its remarks to the majority as well as to the minority"); *United States* v. *Thomas*, 449 F.2d at 1183 (footnote omitted) (noting the coercive nature of "statements susceptible to an interpretation reflecting unwholesomely upon minority jurors simply because they happen to be in the minority"); *United States* v. *Sawyers*, 423 F.2d at 1342 (noting that the *Allen* charge would be "better balanced, and fairer, if mention [were] made of the duty of the majority to listen and consider any minority viewpoint, for * * * being in the majority does not necessarily make one right"); *United States* v. *Fioravanti*, 412 F.2d at 417 (indicating that the "very real treachery of the Allen Charge" is that "[i]t contains no admonition that the majority reexamine its position; it cautions only the minority to see the error of its ways"); *Fields* v. *State*, 487 P.2d 831, 836 (Alaska 1971); *State* v. *Thomas*, 86 Ariz. 161, 162-166, 342 P.2d 197, 198-201 (1959).

feature of the original *Allen* charge that led several federal courts of appeals to adopt a modified version of the *Allen* charge and to require that only the modified version be given. That criticism is inapplicable here. The charge in this case did not contain a passage singling out jurors in the minority and urging them to reconsider their views. Moreover, the judge scrupulously reminded the jurors that, in reconsidering their positions, they should not feel compelled to relinquish their honest beliefs solely because other jurors disagreed with them or just so that the jury could reach a verdict.[10]

The trial judge also did not advise the jury that it was required ultimately to agree upon a verdict, which was the type of statement that this Court found objectionable in *Jenkins* v. *United States*, 380 U.S. 445, 446 (1965) ("You have got to reach a decision in this case."). On the contrary, the judge on three occasions reminded the jurors that, if they could not agree on a sentence, he would impose a sentence of life imprisonment without probation, parole, or suspension of sentence. Those remarks sent the clear message to the jurors that they were not required to render a verdict at all, and that their lack of agreement would not lead to a new trial or to another sentencing proceeding.[11]

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[10] See *United States* v. *Scott*, 547 F.2d at 337; *United States* v. *Kahaner*, 317 F.2d 459, 484-485 (2d Cir.), cert. denied, 375 U.S. 836 (1963); *Berger* v. *United States*, 62 F.2d 438, 440 (10th Cir. 1932).

[11] For that reason, these instructions did not suffer from another defect commonly attributed to other variations of the *Allen* charge, which have been criticized for placing undue emphasis on the prospect of a retrial and the costs that it would impose on both parties. *E.g.*, *United States* v. *Silvern*, 484 F.2d at 880-881; *United States* v. *Thomas*, 449 F.2d at 1183; see *United States* v. *Harris*, 391 F.2d 348, 354-357 (6th

Petitioner contends (Br. 18-19) that the *Allen* charge was coercive because it was given when the jury announced that it was deadlocked, rather than simply as part of the main body of sentencing instructions. But forbidding the trial judge from delivering an *Allen* charge at the time the jury encounters difficulties—particularly when, as in this case, the jury asks to be reinstructed—would largely defeat its purpose. It is at the point at which jury deliberations break down that the jurors most need to be reminded of their duty to deliberate in good faith and with a willingness to consider the opinions of the other jurors. Moreover, a jury that has difficulty reaching a verdict will often look to the trial judge for guidance and encouragement. Ordering the judge to remain silent in that setting will leave the jury in distress and can only lead to confusion among the jurors as to what they should do. When the jury asks for help from the court, it is only reasonable to permit the court to give it. *United States* v. *Kahaner*, 317 F.2d 459, 484 (2d Cir.), cert. denied, 375 U.S. 836 (1963) ("it was quite natural for the judge to comply with the request, as the absence of any objection or exception from defense counsel confirms"); *White* v. *United States*, 279 F.2d 740, 750 (4th Cir.), cert. denied, 364 U.S. 850 (1960).

Contrary to petitioner's contention, the policies underlying the *Allen* charge are applicable to the sentencing phase of a case as well as the guilt phase. The state has a legitimate interest in having the jury "express the conscience of the community on the ultimate question of life or death." *Witherspoon* v. *Illinois*, 391 U.S. 510, 519 (1968) (footnote omitted);

Cir.), cert. denied, 393 U.S. 874 (1968); compare *United States* v. *Angiulo*, 485 F.2d at 39 (charge made extensive references to expenses of trial).

see *Spaziano* v. *Florida*, 468 U.S. 447, 463 (1984); *id.* at 468-470, 480-481 (Stevens, J., dissenting). An *Allen* charge may help to ensure that each juror will perform his sworn responsibility to fix an appropriate punishment based on the considerations relevant to the case. In light of the state's legitimate interest in obtaining a jury verdict on the weighty matter of sentencing, a charge that helps ensure that the jury will perform its duty—in the face of great temptation to avoid doing so—is a perfectly legitimate charge for a court to give, as long as it is not unfairly coercive.[12]

Petitioner repeatedly asserts (Br. 14, 16, 22-24 & n.15) that the effect of the trial court's charge in this case was to communicate to the jury that the court wanted the jury to return a verdict of death. In fact, it is far from clear that that was the effect of the court's charge. It is true that the court on several occasions advised the jurors that if they could not reach a verdict the court would impose a life

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[12] A common criticism of the *Allen* charge is that it undermines a defendant's right to a unanimous verdict. That criticism actually has *less* force in the sentencing phase than in the guilt phase of a trial. Unlike the right to a jury trial on the issue of guilt, a defendant has no constitutional right to have the jury determine his sentence. *Spaziano* v. *Florida*, 468 U.S. at 457-465; *Proffitt* v. *Florida*, 428 U.S. 242, 252 (1976) (opinion of Stewart, Powell, & Stevens, JJ.). While due process in some cases may protect the defendant's right under state law to have the jury make findings at sentencing (see *Cabana* v. *Bullock*, 474 U.S. 376, 387-388 n.4 (1986); *Hicks* v. *Oklahoma*, 447 U.S. 343 (1980)), the state may authorize a trial judge to override a jury's recommendation of life imprisonment (*Spaziano* v. *Florida*, *supra*). An *Allen* charge—even one that has the effect of communicating to the jury that the judge favors the death penalty—obviously involves a much less intrusive role by the court than a decision to override the jury's sentencing recommendation.

sentence. But that instruction did not necessarily suggest that the court favored the death penalty; the jurors could have interpreted it to mean that the court would impose a life sentence as a matter of choice and that the court therefore did not favor the death penalty in this case. In addition, rather than encouraging the forces on the jury who favored the death penalty, the court's instruction might have had the opposite effect. By informing the jury that the alternative to a capital sentence would be a no-parole life sentence, the court's instructions may have relieved pressure within the jury for a verdict of death based on some jurors' possible concern that their failure to reach a verdict would result in no sentence at all or only a short prison term. By assuring the jury that its failure to reach a verdict on sentence would not result in a windfall for the defendant, the court's instructions thus may have encouraged any jurors who were reluctant to vote for the death penalty to continue to resist that verdict.

Petitioner contends (Br. 19-20) that the modified *Allen* charge used here lightened the state's burden of proving at least one aggravating circumstance beyond a reasonable doubt before the jury could consider a capital sentence. That claim lacks merit. The supplemental instruction did not in any way reduce the state's burden of proof, nor did it imply that the jury could resolve its difficulty in reaching a unanimous verdict by using a lower standard of proof (see J.A. 44 (trial court's main sentencing instructions)). In fact, the second modified *Allen* charge used by the court was identical to the one found in the main sentencing instructions. There is no more reason to believe that the jury was misled by the second modified *Allen* charge than by the first one. It is nothing more than speculation to suppose that the jurors will for-

get the main body of instructions given by a trial judge, including the instructions on the government's burden of proof, simply because the judge supplements that charge once the jury signals that it is having difficulty reaching a verdict. Cf. *Hyde* v. *United States*, 225 U.S. at 383.[13]

Finally, the fact that the jury returned a verdict after only another half hour of deliberation following the *Allen* charge does not suggest that the *Allen* charge was unfairly coercive. See *United States* v. *Smith*, 635 F.2d 716, 721-722 (8th Cir. 1980) (45-minute period between charge and verdict not indicative of coercion); *United States* v. *Dawkins*, 562 F.2d 567, 570 (8th Cir. 1977) (same); *Andrews* v. *United States*, 309 F.2d 127, 130 (5th Cir. 1962) (25-minute period). The charge given by the trial court forcefully reminded the jurors not to relinquish their honest beliefs just to reach a verdict. Although the fact that the jury reached a verdict following the *Allen* charge obviously suggests that the charge had some effect, there is no reason to suppose that the effect was the improper one of coercing a verdict, rather than the entirely proper one of persuading the

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[13] To bolster his argument, petitioner relies (Br. 19) on the rule adopted by the First and Eighth Circuits that a supplemental instruction should reiterate the government's burden of proof. See *United States* v. *Angiulo*, 485 F.2d 37, 43 (1st Cir. 1973); *Potter* v. *United States*, 691 F.2d 1275, 1280 (8th Cir. 1982). These two circuits stand alone on this point. The *Allen* decision does not require the jury to be reinstructed on the government's burden of proof (164 U.S. at 501-502), and the other federal courts of appeals have not adopted such a rule. Even the two circuits that have required a reinstruction on the burden of proof have done so in the exercise of their supervisory powers, and have not held that such a reinstruction is constitutionally required.

jury to make another good faith effort to reach agreement.

B. Polling The Jury To Determine The Utility Of Further Deliberations, Even In Conjunction With The Modified Supplemental *Allen* Charge, Was Not Coercive

Relying upon this Court's decision in *Brasfield* v. *United States*, 272 U.S. 448 (1926), petitioner also challenges (Br. 14-16) the court's poll of the jury on the question whether further deliberations would be useful. The inquiry undertaken by the trial judge in this case, however, is not the type of inquiry that the Court condemned in *Brasfield*, and it did not have the coercive impact of the inquiry at issue in that case.

1. *Brasfield* must be read against the background of the Court's decision in *Burton* v. *United States*, 196 U.S. 283 (1905). In *Burton*, the trial judge asked the jury for its numerical division before delivering an *Allen* charge. 196 U.S. at 305. The conviction was reversed on other grounds, but this Court disapproved of the judge's inquiry. The Court emphasized that, from the standpoint of "the proper administration of the law," there was no need for the inquiry, since "[a]ll that the judge said in regard to the propriety and duty of the jury to fairly and honestly endeavor to agree could have been said without asking for the fact as to the proportion of their division" (*id.* at 308). The Court added that, because "[c]ases may easily be imagined where a practice of this kind might lead to improper influences," the practice should not be followed (*ibid.*).

In *Brasfield*, the jury deliberated for several hours without reaching a verdict. The judge then brought the jury into court and asked the foreman how the jury stood numerically. The foreman replied that

the jury stood nine to three, without indicating which number favored a conviction. 272 U.S. at 449. The judge then delivered a modified *Allen* charge. Transcript of Record at 95, *Brasfield* v. *United States*, No. 243, 1926 Term. This Court reversed in a brief opinion, ruling that district courts should not ask a deadlocked jury for its numerical division. The Court explained that the inquiry "serves no useful purpose that cannot be attained by questions not requiring the jury to reveal the nature or extent of its division" (272 U.S. at 450). The Court held that such an inquiry would be treated as per se reversible error, since the practice will generally have a coercive effect that is difficult to assess in a particular case (*ibid.*).

Two aspects of the decision in *Brasfield* are significant here. *First*, the ruling in *Brasfield* rested on the Court's supervisory power, and not the Constitution, as the federal courts of appeals have unanimously concluded.[14] While the opinion stated that the

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[14] In habeas corpus actions challenging state convictions, the courts of appeals have uniformly rejected a requirement of reversal per se in favor of determining whether the accused was actually prejudiced under the totality of the circumstances. See *Williams* v. *Parke*, 741 F.2d 847, 851 (6th Cir. 1984), cert. denied, 470 U.S. 1029 (1985); *Locks* v. *Sumner*, 703 F.2d 403, 405-407 (9th Cir.), cert. denied, 464 U.S. 933 (1983); *United States ex rel. Kirk* v. *Director, Dep't of Corrections*, 678 F.2d 723, 725-727 (7th Cir. 1982); *Cornell* v. *Iowa*, 628 F.2d 1044, 1047-1048 (8th Cir. 1980), cert. denied, 449 U.S. 1126 (1981); *Ellis* v. *Reed*, 596 F.2d 1195, 1197-1198 (4th Cir.), cert. denied, 444 U.S. 973 (1979); *Jones* v. *Norvell*, 472 F.2d 1185, 1186 (6th Cir.), cert. denied, 411 U.S. 986 (1973); *Marsh* v. *Cupp*, 392 F. Supp. 1060, 1063-1064 (D. Or. 1975), aff'd, 536 F.2d 1287, 1290-1291 (9th Cir.), cert. denied, 429 U.S. 981 (1976).

State courts have also generally ruled that the *Brasfield* rule does not rest on the Due Process Clause. See, *e.g.*, *People* v. *Carter*, 68 Cal. 2d 810, 815, 442 P.2d 353, 356, 69 Cal.

rule adopted by the Court was "essential to the fair and impartial conduct of the trial" (272 U.S. at 450), nowhere did the opinion mention the Due Process Clause or any other constitutional provision. And a reading of the *Burton* case, on which *Brasfield* was based, makes it clear that the Court was employing its supervisory power over the federal courts to direct that the inquiry not be made in federal cases because of the risk that it "might lead to improper influences" in some instances.

Second, the decision in *Brasfield* rested on three factors: (1) the judge's solicitation (2) of the jury's numerical division (3) followed by the use of an *Allen* charge. The importance of those factors is implicit in both *Brasfield* and *Burton*, and the federal courts of appeals have read *Brasfield* as limited to that factual context. They have not required that a conviction automatically be reversed when information is not solicited by the judge, but is volunteered by the jurors.[15] They also have not required reversal

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Rptr. 297, 300 (1968); *State* v. *Rickerson*, 95 N.M. 666, 625 P.2d 1183, cert. denied, 454 U.S. 845 (1981); *State* v. *Fowler*, 312 N.C. 304, 307-308, 322 S.E.2d 389, 391-392 (1984); *Muhammad* v. *State*, 243 Ga. 404, 407-408, 254 S.E.2d 356, 358-359 (1979); *State* v. *Roberts*, 131 Ariz. 513, 515-516, 642 P.2d 858, 860-861 (1982); cf. *Mayfield* v. *State*, 302 Md. 624, 631-632 & n.3, 490 A.2d 687, 691-692 & n.3 (1985) (no reversible error when a jury voluntarily reveals its division, distinguishing the voluntary disclosure from *Brasfield*). Some courts, however, have exercised their supervisory power to forbid trial judges from polling the jury. *E.g.*, *People* v. *Luther*, 53 Mich. App. 648, 219 N.W.2d 812 (1974).

[15] *E.g.*, *United States* v. *Rengifo*, 789 F.2d 975, 985 (1st Cir. 1986); *United States* v. *Akbar*, 698 F.2d 378, 380 (9th Cir.), cert. denied, 461 U.S. 959 (1983); *United States* v. *Cook*, 663 F.2d 808, 809 n.3 (8th Cir. 1981); *United States* v. *Warren*, 594 F.2d 1046, 1049 n.3 (5th Cir. 1979); *United*

when the judge asks whether further deliberations would be useful, rather than how the jury is divided.[16] And they have not reversed convictions when the judge's inquiry is not followed by an *Allen* charge.[17]

2. The trial court's inquiry in this case did not run afoul of *Brasfield* for both of the reasons discussed above. First, because this is a state prosecution, the supervisory rule adopted in *Burton* and *Brasfield* is inapplicable. The issue instead is whether the inquiry by the court was so coercive as to violate petitioner's rights under the Constitution. Second, the inquiry in this case was not an inquiry into the numerical division of the jury, but only into whether the jurors believed further deliberations would be useful—a very different matter from the inquiry at issue in *Brasfield*.

States v. *Diggs*, 522 F.2d 1310, 1322 (D.C. Cir. 1975), cert. denied, 429 U.S. 852 (1976); *United States* v. *Jennings*, 471 F.2d 1310, 1313-1314 (2d Cir.), cert. denied, 411 U.S. 935 (1973); *Gafford* v. *Warden*, 434 F.2d 318, 319 (10th Cir. 1970); *United States* v. *Sawyers*, 423 F.2d 1335, 1340-1341 (4th Cir. 1970); *Sanders* v. *United States*, 415 F.2d 621, 629, 631-632 (5th Cir. 1969), cert. denied, 397 U.S. 976 (1970); *United States* v. *Rao*, 394 F.2d 354, 356 (2d Cir.), cert. denied, 393 U.S. 845 (1968); *Bowen* v. *United States*, 153 F.2d 747, 752 (8th Cir.), cert. denied, 328 U.S. 835 (1946). But see *United States* v. *Sae-Chua*, 725 F.2d 530 (9th Cir. 1984).

[16] *United States* v. *Smoot*, 463 F.2d 1221, 1223 (D.C. Cir. 1972); *Carlton* v. *United States*, 395 F.2d 10, 11 (9th Cir. 1968), cert. denied, 393 U.S. 1030 (1969); *United States* v. *Mack*, 249 F.2d 321, 324 (7th Cir. 1957), cert. denied, 356 U.S. 920 (1958); see *United States ex rel. Anthony* v. *Sielaff*, 552 F.2d 588, 590 (7th Cir. 1977); *United States* v. *See*, 505 F.2d 845, 851 (9th Cir. 1974), cert. denied, 420 U.S. 992 (1975).

[17] *Beale* v. *United States*, 263 F.2d 215 (5th Cir. 1959); *Butler* v. *United States*, 254 F.2d 875 (5th Cir. 1958); see also *United States* v. *Rogers*, 289 F.2d 433, 435 n.5 (4th Cir. 1961) (dictum).

The inquiry as to whether further deliberations will be useful should not be treated in the same manner as an inquiry into the jury's division, because determining whether further deliberations would be useful has the legitimate purpose of helping the court decide whether to declare a mistrial. The decision whether a mistrial should be declared because the jurors are unalterably deadlocked is a difficult one and can have serious repercussions for both parties. See *Arizona* v. *Washington*, 434 U.S. 497, 509-510 (1978); *United States* v. *Graham*, 758 F.2d 879, 884 (3d Cir.), cert. denied, 474 U.S. 901 (1985); *United States* v. *Goldstein*, 479 F.2d 1061, 1069 (2d Cir.), cert. denied, 414 U.S. 873 (1973). It is a step that ought to be taken with caution and only after the judge concludes that continued deliberations would be pointless. Given the importance of the decision, a trial judge ought to have as much information as reasonably possible before determining whether to discharge the jury. The single most important fact bearing on that decision is how the jurors themselves feel about the likelihood that continued deliberations may result in a verdict. Just as it would be unfortunate to discharge a jury that can reach agreement, so too it would be unreasonable to force jurors to prolong their deliberations if all or most of them doubt that a consensus can be reached. Determining the utility of further deliberations therefore is an entirely legitimate reason to question the jurors. *United States ex rel. Anthony* v. *Sielaff*, 552 F.2d 588, 590 (7th Cir. 1977); see *United States ex rel. Webb* v. *Court of Common Pleas*, 516 F.2d 1034, 1043-1044 (3d Cir. 1975).

Besides serving a legitimate and important purpose, an inquiry of the sort conducted in this case is not inherently coercive. It is not designed to, and

need not, elicit the jurors' numerical division. Jurors convinced of the defendant's guilt may believe with equal conviction that the deadlock cannot be broken. Jurors not convinced beyond a reasonable doubt may be open to persuasion and may have additional concerns they would like to explore in further deliberations. Contrary to petitioner's assumption, the jurors' assessments of the prospects for a verdict thus do not inevitably reflect the jury's division on the underlying issue.

Finally, the inquiry is neutral. It does not by its nature suggest that the judge desires any particular outcome. It asks only whether the jurors wish to continue their deliberations. In fact, trial judges often ask juries about the progress of deliberations for reasons totally divorced from resolving a deadlock—*e.g.*, to plan mealtimes or to make accommodations for sequestration of the jury. Thus, it cannot be presumed that an inquiry of the sort conducted in this case is inevitably coercive, and for that reason, it would be inappropriate to extend the rule adopted in *Brasfield* to this kind of inquiry.[18]

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[18] Although the issue is not directly presented in this case, we believe that in the appropriate case this Court may wish to reconsider the aspect of *Brasfield* that requires reversal in any federal case in which the court inquires into the division of the jury. At the time *Brasfield* was decided in 1926, every circuit endorsed a version of the *Allen* charge that included a passage specifically directed to jurors in the minority. See *Fulwood* v. *United States*, 369 F.2d 960, 962 & n.3 (D.C. Cir. 1966) (collecting cases), cert. denied, 387 U.S. 934 (1967). The combination of asking the jurors about their numerical division and admonishing the jurors in the minority to rethink their views must have seemed to the Court to be a virtual guarantee of coerciveness. But several circuits today forbid an admonition specifically directed to the minority

* * * * *

In sum, we submit that the two procedures challenged here—the delivery of an *Allen* charge and the inquiry of the jurors as to whether further deliberations would likely be productive—are both legitimate steps for a trial court to take when a deliberating jury has difficulty reaching a verdict. And even if those measures can be coercive under some circumstances, nothing in the record suggests that those steps had a coercive effect on the jury in this case.

CONCLUSION

The judgment of the court of appeals should be affirmed insofar as that court rejected petitioner's claim that the jury was coerced into returning a capital sentence.

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jurors. When that is the case, the Court's fears about the "general[] harmful[ness]" of such an inquiry (*Brasfield*, 272 U.S. at 450) should be greatly alleviated.

Furthermore, since *Brasfield* was decided, this Court has emphasized that "it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless" (*United States* v. *Hasting*, 461 U.S. 499, 509 (1983)), and that the courts are capable of discerning whether most errors, including most constitutional violations, are prejudicial (see *Rose* v. *Clark*, No. 84-1974 (July 2, 1986), slip op. 8, 9 & n.7). Two decisions are particularly relevant. *United States* v. *Hasting*, 461 U.S. at 505-512, ruled that the federal courts may not invoke their supervisory power to upset a conviction if an error is harmless. Similarly, *United States* v. *Lane*, 474 U.S. 438, 444-446 (1986), held that the per se rule adopted in *McElroy* v. *United States*, 164 U.S. 76 (1896), that the misjoinder of offenses requires reversal, must be re-examined in light of the subsequent developments in the harmless error doctrine. The decisions in *Hasting* and *Lane* support the conclusion that the procedural rule adopted in *Brasfield* should not call for reversal in every case regardless of the circumstances.

Respectfully submitted.

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APPENDIX

1. The supplemental jury instruction approved in *Allen* provided, in relevant part, as follows (Transcript of Record at 137-138, *Allen* v. *United States*, No. 371, 1896 Term):

> The only mode provided by our Constitution and laws for deciding questions of fact in criminal cases is by the verdict of the jury. In a large proportion of cases, and, perhaps, strictly speaking, in all cases, absolute certainty can not be attained or expected. Although the verdict to which a juror agrees must of course be his own verdict, the result of his own convictions, and not a mere acquiescence in the conclusion of his fellows, yet, in order to bring twelve minds to a unanimous result, you must examine the questions submitted to you with candor and with a proper regard and deference to the opinions of each other. You should consider that the case must at some time be decided; that you are selected in the same manner and from the same source from which any future jury must be, and there is no reason to suppose that the case will ever be submitted to 12 men more intelligent, more impartial, or more competent to decide it, or that more or clearer evidence will be produced on the one side or the other. And with this view it is your duty to decide the case if you can conscientiously do so. In order to make the decision more practicable, the law imposes the burden of proof on the one party or the other in all cases. In the present case the burden of proof is upon the Goverment of the United States. But in con-

> ferring together you ought to pay proper respect to each other's opinions and listen with a disposition to be convinced to each other's arguments. And, on the other hand, if much the larger number of your panel are for conviction, a dissenting juror should consider a doubt in his own mind is a reasonable one, which makes no impression upon the minds of so many men, equally honest, equally intelligent with himself, and who have heard the same evidence, with the same attention, with an equal desire to arrive at the truth, and under the sanction of the same oath. And, on the other hand, if a majority are for acquittal, the minority ought to seriously ask themselves whether they may not reasonably and ought not to doubt the correctness of a judgment which is not concurred in by most of those with whom they are associated, and distrust the weight or sufficiency of that evidence which fails to carry conviction to the minds of their fellows.

2. The Fifth and Eleventh Circuits have approved a supplemental instruction that takes the following form (see U.S. Fifth Circuit District Judges Association, *Pattern Jury Instructions—Criminal Cases* 168-169 (1978); U.S. Eleventh Circuit District Judges Association, *Pattern Jury Instructions—Criminal Cases* 262-263 (1985)):

> I'm going to ask that you continue your deliberations in an effort to reach agreement upon a verdict and dispose of this case; I have a few additional comments I would like for you to consider as you do so.
>
> This is an important case. The trial has been expensive in time, effort, money and emotional strain to both the defense and the prosecution.

If you should fail to agree upon a verdict, the case will be left open and may have to be tried again. Obviously, another trial would only serve to increase the cost to both sides, and there is no reason to believe that the case can be tried again by either side any better or more exhaustively than it has been tried before you.

Any further jury must be selected in the same manner and from the same source as you were chosen, and there is no reason to believe that the case could ever be submitted to twelve men and women more conscientious, more impartial, or more competent to decide it, or have that more or clearer evidence could be produced.

If a substantial majority of your number are in favor of a conviction, those of you who disagree should reconsider whether your doubt is a reasonable one, since it appears to make no effective impression upon the minds of the others. On the other hand, if a majority or even a less number of you are in favor of an acquittal, the rest of you should ask yourselves again and most thoughtfully whether you should accept the weight and sufficiency of evidence which fails to convince your fellow jurors beyond a reasonable doubt.

Remember at all times that no juror is expected to give up an honest belief he or she may have as to the weight or effect of the evidence; but, after full deliberation and consideration of the evidence in the case, it is your duty to agree upon a verdict if you can do so.

You must also remember that if the evidence in the case fails to establish guilt beyond a reasonable doubt the Defendant should have your unanimous verdict of Not Guilty.

You may be as leisurely in your deliberations as the occasion may require and should take all the time which you may feel is necessary.

I will ask now that you retire once again and continue your deliberations with these additional comments in mind to be applied, of course, in conjunction with all of the other instructions I have previously given you.

3. The American Bar Association has approved the following standard for supplemental instructions (Standards Relating to Trial by Jury § 5.4, at 145-146 (1968)):

Length of Deliberations; deadlocked jury.

(a) Before the jury retires for deliberation, the court may give an instruction which informs the jury:

(i) that in order to return a verdict, each juror must agree thereto;

(ii) that jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;

(iii) that each juror must decide the case for himself, but only after an impartial consideration of the evidence with his fellow jurors;

(iv) that in the course of deliberations, a juror should not hesitate to reexamine his own views and change his opinion if convinced it is erroneous; and

(v) that no juror should surrender his honest conviction as to the weight or effect of

the evidence solely because of the opinion of his fellow jurors, or for the mere purpose of returning a verdict.

(b) If it appears to the court that the jury has been unable to agree, the court may require the jury to continue their deliberations and may give or repeat an instruction as provided in subsection (a). The court shall not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals.

(c) The jury may be discharged without having agreed upon a verdict if it appears that there is no reasonable probability of agreement.

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